82-1920

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,

Petitioner

V.

WILLIAM SANFORD ELEY, II AND HONORABLE
WILLIAM R. GORDON, CIRCUIT JUDGE,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA;
THE COURT OF CRIMINAL APPEALS
OF ALABAMA AND THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Did this Honorable Court's decision and opinion in Illinois v. Vitale, (447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 [1980]) overrule, supersede, modify or limit the rule of double jeopardy announced by this Honorable Court in Blockburger v. United States, (284 U.S. 299, 76 L. Ed. 306, 52 52 S. Ct. 180 [1932])?

2. Where a party in the same sequence of events drives under the influence of intoxicating liquor and assaults another person with his automobile, does a conviction for driving under the influence of intoxicating liquor constitute former jeopardy as to a charge of reckless assault, where driving under the influence and reckless assault share no common element, driving under the influence does not necessarily

involve or constitute recklessness and the State proves or offers to prove numerous reckless acts in addition to driving under the influence?

THE PARTIES

In the Honorable Circuit Court of Montgomery County, Alabama, the parties were: The State of Alabama, in whose name the prosecution was brought and who is the Petitioner herein, and William Sanford Eley II, who is a Respondent herein.

In the Court of Criminal Appeals and Supreme Court of Alabama the real parties in interest were the same state of Alabama, Petitioner in the mandamus proceeding and William Sanford Eley II, a Respondent in the same proceeding. The nominal parties in said State Appellate Courts were: Honorable William R.

Gordon, Circuit Judge, Respondent Judge in the mandamus proceeding and a Respondent here and James H. Evans, District Attorney and Charles A. Graddick, Attorney General, Relators in the mandamus proceeding.

The matters presented by this petition were first raised in the Circuit Court of Montgomery County, Alabama, by Respondent Eley's Pleas of Autre fois convict and former jeopardy. The State of Alabama joined issue on said plea on the basis of the matters raised herein. These matters have been at issue throughout the State Court proceedings.

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OPINIONS BELOW

The opinion and order of the Honorable Circuit Court of Montgomery County, Alabama, dismissing the prosecution of William Sanford Eley II is not and will not be reported. The same is submitted as Appendix "A" to this brief.

The decisions and opinions of the Court of Criminal Appeals and Supreme Court of Alabama dismissing the State's appeal from the above order on the grounds that the Governor had inadvertently "pocket vetoed" the statute authorizing the State to appeal are reported as follows:

State v. Eley, 423 So. 2d 303 (Cr. App. Ala., 1982) and

Ex parte: State; In re: State v. Eley, 423 So. 2d 305 (S. Ct. Ala., 1982)

Since said attempted appeal was collateral to this case and neither Court addressed nor even mentioned the matters at issue in the instant proceeding, these decisions and opinions are of historical interest only, and the record will not be burdened by appending them hereto.

The order of the Court of Criminal Appeals of Alabama denying without opinion the State of Alabama's petition for a writ of mandamus to review the order of the Circuit Court dismissing the prosecution on grounds of former jeopardy is not as yet reported but will be reported as:

> Ex parte: State; Ex rel. Graddick & Evans; In re: State v. Eley, ____ So. 2d ____ (Cr. App. Ala., 1983)

A copy of the same is submitted as Appendix "B" hereto.

The order of the Supreme Court of Alabama denying without opinion the State of Alabama's petition for a writ of certiorari is not reported as yet but will be reported as follows:

> Ex parte: State; In Re: Ex parte: State; Ex rel Graddick & Evans; In Re: State v. Eley, ____ So. 2d ____ (S. Ct. Ala., 1983)

A copy of the same is submitted as Appendix "C" hereto.

JURISDICTION

The order of the Supreme Court of Alabama denying certiorari was issued April 8, 1983, and this petition is filed within sixty (60) days of said date:

The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1257(3)

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States, which reads as follows:

> "No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis supplied)

2. Section one of the Fourteenth Amendment to the Constitution of the United States which reads as follows:

> "...All persons born or naturalized in the United States, and subject to the jursidiction thereof, are citizens of the

United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws...."

STATUTORY PROVISIONS INVOLVED

Respondent Eley was charged with assault in the first degree under Title 13A, Section 13A-6-20(a)(3), Code of Alabama, 1975, which is submitted as Appendix "D" hereto. The portion of this statute under which Respondent Eley was charged reads as follows:

"§13A-6-20. Assault in the first degree.

"(a) A person commits the crime of assault in the first degree if:...

"(3) Under circumstances manifesting extreme indifference to the value of human

> life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to any person...."

Respondent Eley obtained dismissal of the assault charge on the grounds that his conviction for driving under the influence of intoxicating liquor allegedly constituted former jeopardy as to the assault charge. Eley's conviction for the traffic offense was under Section 25-68, Montgomery [Alabama] City Code, 1980, which is submitted as Appendix "E" hereto.

STATEMENT OF THE CASE AND THE FACTS

This case arose out of an incident on December 31, 1981, in Montgomery, Alabama, in which Respondent William Sanford Eley II drove his automobile into that driven by Mrs. Karen H.

Hellums, causing massive injuries to her. At the hearing before the Honorable Trial Judge the State represented that if permitted to try this case it would show that the collision resulted from Eley's being highly intoxicated, speeding, driving inattentively, running a blinking red light and failing to yield the right-of-way. Respondent Eley was charged with driving under the influence[1], a misdemeanor under Montgomery City ordinances. (See Appendix "E") Eley was ultimately convicted of driving under the influence, paid a fine and received a suspended sentence. Respondent Eley was also charged with assault in the first degree

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[1]The full title of this offense is: "Driving under the influence of intoxicating liquors or beverages, narcotics or barbiturate drugs." In the interest of brevity and clarity this offense will be referred to herein as "driving under the influence."

under State statutes. Title 13A, Section 13a-6-20(a)(3), Code of Alabama, 1975; Appendix "D". (R.[2] pp. 4-6 and 21-22; see Appendix "A" pp. 1-5 and 24)

The indictment of Respondent Eley read as follows:

> "The Grand Jury of said [Montgomery] County charge that before the finding of this indictment, WILLIAM SANFORD ELEY II, whose name is to the Grand Jury otherwise unknown, did, under circumstances manifesting extreme indifference to the value of human life, recklessly engage in conduct which created a grave risk of death to another person and did thereby cause serious physical injury to Karen H. Hellums by operating a motor vehicle while the same William Sanford Eley II was under the influence of intoxicating beverages, and did cause said motor vehicle to run into, over, upon, against or collide with the motor vehicle in which Karen H. Hellums was driving, thereby causing

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[2]"R" refers to the Exhibit to the mandamus petition.

> serious physical injury to the said Karen H. Hellums, in violation of Section 13A-6-20 of the Code of Alabama, against the peace and dignity of the State of Alabama. (R. pp. 1-2)

On arraignment Respondent Eley pleaded not guilty and not guilty by reason of insanity. Seven days later he entered a plea of autre fois convict and former jeopardy claiming that his driving under the influence conviction barred the assault charge. The Honorable Respondent, as Judge of the Circuit Court of Montgomery County, overruled this plea on the grounds that the two offenses were not the same. However, Respondent Eley renewed this plea on June 24, 1982. (R. pp. 3-7) It is the ruling on this renewed plea of former jeopardy which is at issue in this case.

On September 1, 1982, the Honorable Trial Judge dismissed the assault

indictment on the basis of Respondent Eley's former jeopardy claim. His Honor's lengthy opinion is submitted as Appendix "A" to this petition and is merely highlighted here. His Honor noted that Eley's claim rested on Illinois v. Vitale, (447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 [1980]).[3] It was conceeded and found that unless Vitale radically altered the law, Eley's claim of former jeopardy had to be rejected.[4]

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[3]"...Defendant [Eley] rests his plea on Illinois v. Vitale, 447 U.S. 410 (1980) -- with all respect, a case simply written, but with a labyrinthian result. Before examining Vitale, certain fundamental concepts of double jeopardy should be noted...." (R. p. 23, Appendix "A", p. 7)

[4]"...Defendant [Eley] concedes, as he must, that application of Blockburger [v. United States, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932)] to the instant case requires that the plea be overruled. However, he earnestly

His Honor then analyzed Vitale and concluded that in that case this Honorable Court had established a new test for former jeopardy which disallows any evidence of conduct relating to a former conviction. Under His Honor's understanding of Vitale, the State would not be allowed to introduce any evidence which in any way related to driving under the influence. Since the indictment mentioned driving under the influence as part of the means of the assault, His Honor concluded that the indictment had

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footnote 4 con't:

contends that Vitale has modified Blockburger and that application of the modified test requires the court to sustain the plea.

Additionally, prior to Vitale, there is little reason to question but that under the facts of the case sub judice, the plea fails...." (R. p. 24, Appendix "A", p. 9)

to be dismissed. (R. pp. 21-34, Appendix "A")

Six days later the State of Alabama initiated a long and thus far utterly unsuccessful effort to get an appellate court to review the merits of His Honor's ruling. The State first attempted an appeal under a new state statute. This attempt failed when the Court of Criminal Appeals of Alabama ruled that the Governor had inadvertantly "pocket vetoed" the law giving the State the right to appeal. (R. pp. 35-36; State v. Eley, 423 So. 2d 303 [Cr. App. Ala., 1982]; cert. den. 423 So. 2d 305 [S. Ct. Ala., 1982]) Then the State instituted the instant proceeding as a mandamus action against the Honorable Trial Judge.[5] The State's petition was filed

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[5]Mandamus is the only remedy available to the State under Alabama Law in this situation. Ex parte: Nice, 407 So. 2d 874 (S. Ct. Ala. 1981)

in the Court of Criminal Appeals of Alabama on January 5, 1983 and denied without opinion on January 10, 1983. (Appendix "B") On January 20, 1983, the State applied for rehearing and requested the finding of facts; both were denied without opinion on January 24, 1983. (Appendix "B") The State's petition for a writ of certiorari was denied without opinion by the Alabama Supreme Court on April 8, 1983. (Appendix "C")

SUMMARY OF THE ARGUMENT

The State of Alabama has sought and is seeking review of the Honorable Respondent's ruling not just because his ruling is erroneous but because the ruling is based on an erroneous legal theory, which will of necessity prevent the State from trying the case under a new indictment.

The Alabama Courts expressly stated that they were not following this Honorable Court decision in Blockburger v. United States, (284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 [1932]). The Alabama Courts claimed to have followed instead Illinois v. Vitale, (447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 [1980]), which the State Courts held overruled, superceded or modified Blockburger. It follows that if Blockburger is still sound law, this case should be reversed summarily.

The decision of the Alabama Courts is in patent conflict with this Honorable Court's decision and opinion in Illinois v. Vitale, (447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 [1980]) in every way. There are conflicts with the case in general, conflicts with each of the four points stated or implied by the

majority of this Honorable Court, and conflicts with the two points made by the Honorable dissenters, in this Honorable Court. Most importantly, this Honorable Court in Vitale and subsequent cases relied heavily on Blockburger v. United States, (284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 [1932]), while the Honorable Alabama Trial Judge held that Vitale overruled, superceded or modified Blockburger.

ARGUMENT

INTRODUCTION

This petition represents the State of Alabama's seventh effort to obtain appellate review of the Honorable Trial Judge's ruling that Illinois v. Vitale, (447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 [1980]) overruled, superceded or modified this Honorable Court's classic

decision in Blockburger v. United States, (284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 [1932]). The State has sought such review, not merely because His Honor's ruling is incorrect but because of the legal theory on which His Honor based his ruling. His Honor's reading of Vitale is that, once a party is convicted of certain conduct, no evidence relating to that conduct can be introduced in a prosecution for an other offense arising out of the same transaction. For example, if a person commits a robbery, a rape and a murder using a pistol, he could, under this Court's decisions be separately tried, convicted and sentenced for robbery, rape and murder. Blockburger v. United States, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932); Iannelli v. United States, 420 U.S. 770, 43 L. Ed. 2d 616, 95 S. Ct. 1284 (1975).

However, under His Honor's approach, if the person was first convicted of possession of a pistol without a permit, he could be convicted of these other offenses only if the prosecution could prove its case without any reference to a pistol.

In the instant case, if the State reindicted Eley for assault, it could easily prove recklessness by showing Eley's speeding, inattentive driving, running the blinking red light and failure to yield the right-of-way, but any evidence of these facts would also tend to show that Eley was driving under the influence, and would, under His Honor's understanding of Vitale, have to be excluded. Of course, once trial commenced and the State found that all of its evidence was excluded, because of the necessary implications of His Honor's

erroneous theory, it would be too late to seek review. The State would have to rest with its case unproven and await the unavoidable verdict of acquittal.

REASONS FOR GRANTING THE WRIT

I.

CONFLICT WITH BLOCKBURGER V. UNITED STATES (284 U.S. 299 [1932])

The classic case on former jeopardy as to different offenses in the same sequence of events is Blockburger v. United States, (284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 [1932]). Blockburger held that for purposes of double jeopardy, offenses based on the same facts are subject to separate prosecution if they are not the same, and they are not the same if each has one element in its corpus delecti that is not included

in that of the other. Blockburger v. United States, Gore v. United States, 357 357 U.S. 386, 2 L. Ed. 2d 1405, 78 S. Ct. 1280 (1958); Iannelli v. United States, 420 U.S. 770, 43 L. Ed. 2d 616, 95 S. Ct. 1284 (1975); Albernaz v. United States, 450 U.S. 333, 67 L. Ed. 2d 275, 101 S. Ct. 1137 (1981). Thus offenses are the same for jeopardy purposes, even if they have different names, if they have the exact same elements of their corpus delecti. Missouri v. Hunter, ____ U.S. ____, 74 L. Ed. 2d 535, 103 S. Ct. ____ (1983) On the other hand, where the corpus delecti of an offense is contained in its entirety in the corpus delecti of another offense, the two are the same for jeopardy purposes. In re: Nielsen, 131 U.S. 176, 33 L. Ed. 118, 9 S. Ct. 672 (1889); Harris v. Oklahoma, 433 U.S. 682, 53 L. Ed. 2d 1054, 97 S. Ct. 2912 (1977); Brown v. Ohio, 432 U.S. 161, 53

L. Ed. 2d 187, 97 S. Ct. 2221 (1977) But, where two offenses each have at least one uncommon element in their corpus delecti, they are not the same for jeopardy purposes. This is the well established rule which this Honorable Court has consistently followed.

There is no need to burden this Honorable Court with a lengthy discussion of the differences between drunk driving and assault. As defined by the statutes, Appendicies, "D" and "E", the two offenses share no elements at all. Most significantly, it was conceded by Respondent Eley and found by the Honorable Respondent Trial Judge, that under Blockburger Eley's former jeopardy claim must fail. The issue in this case is not whether the State Courts followed this Honorable Court's decision in

Blockburger, they admittedly did not. The issue here is whether Blockburger still represents good law. If it does, then the Alabama Courts have embarked on a grossly wrong course in pursuing the Double Jeopardy Clause of the Fifth Amendment to the Constitution.

The Alabama Courts reached their decision in an effort to follow Illinois v. Vitale, (447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 [1980]). As will be discussed below, they misapplied Vitale in every way. If, as is argued below, Vitale did not overrule, supercede or modify Blockburger, as the Alabama Courts found, it would appear that this case ought to be summarily reversed.

II.

CONFLICT WITH ILLINOIS V. VITALE (447 U.S. 410 [1980])

A.

IN GENERAL

The case of Illinois v. Vitale, (447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 [1980]) was substantially identical to the instant case. There an individual by reckless conduct with his motor vehicle killed two children. He was convicted of a traffic offense in an inferior court, and the state courts held that under the Double Jeopardy Clause the misdemeanor conviction barred a prosecution for manslaughter. In re: Vitale, 71 Ill 2d 229, 16 Ill. Dec. 456, 375 N.E. 2d 87 (1978) This Honorable Court reversed, holding: (1) The misdemeanor conviction would bar the felony prosecution if, and only if, the misdemeanor was always an element of

manslaughter. and (2) Vitale would have a substantial double jeopardy claim only if the state relied solely on the conduct represented by the misdemeanor conviction to prove an element of manslaughter.

In the instant case, Eley by recklessly operating his vehicle severely injured a lady. He was convicted of a traffic offense, and the state courts have held that, although driving under the influence and assault, have no common elements, neither is an element of the other and the state offered to prove numerous other unlawful and reckless acts, the misdemeanor conviction barred the felony prosecution. This holding is in patent conflict with what this Honorable Court ruled in Vitale.

This obvious conflict will be examined in some detail in the subsections below.

B.

CONFLICT WITH THE MAJORITY OPINION IN VITALE

As mentioned above, the Illinois Courts in Vitale dismissed the prosecution before trial. This Honorable Court vacated and remanded. As to dismissal before trial, this Court held that the conviction for failure to reduce speed (Vitale's misdemeanor) was a bar to manslaughter prosecution if, and only if, the traffic offense was always a necessary element of manslaughter with an automobile. Under Alabama law, as found by the Honorable Respondent Trial Judge, driving under the influence is not an element of assault. Thus, in dismissing this prosecution, the Alabama Courts ruled contrary to Vitale on this point.

Then, this Court wrote:

"...Of course, any collision between two automobiles or between an automobile and a

> person involves a moving automobile and in that sense a 'failure' to slow sufficiently to avoid the accident. But such a 'failure' may not be reckless or even careless, if, when the danger arose, slowing as much as reasonably possible would not alone have avoided the accident. Yet, reckless driving causing death might still be proved if, for example, a driver who had not been paying attention could have avoided the accident at the last second, had he been paying attention, by simply swerving his car. The point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the 'same' under the Blockburger test. The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution. (447 U.S. 410, 419, 65 L. Ed. 228, 237) (Emphasis supplied)

This language is of extreme importance because it demonstrates that this Court was aware that the State of Illinois would not be able to prove a case against

Vitale without offering evidence of the same conduct which was represented by the misdemeanor conviction. Yet, obviously this Honorable Court found no jeopardy problems with this situation. This is in absolute conflict with the Alabama Court's ruling that any evidence of conduct represented by the misdemeanor conviction would be inadmissible in the felony prosecution.

This Honorable Court in Vitale then went on to discuss the problem of the State's relying on Vitale's failure to reduce speed as THE RECKLESS ACT necessary to prove manslaughter. As the language quoted above demonstrates, the Court was aware that the State of Illinois would have to show a reckless failure to reduce speed in order to prove its case, and the Court held that, if the State relied entirely on such conduct to

prove an element of the manslaughter case, then a substantial double jeopardy claim would arise. However, this court noted that there were indications of other offenses in record[6] and saw no need to resolve a claim which might never arise.

In the instant case, there is no need to wonder if the State will rely on driving under the influence to prove that Eley was reckless. Alabama law is very strict on drunk driving. The statement, "I had only two or three beers," is a confession to the offense. However, by the same token, it can not be argued that driving under the influence, as defined

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6"...The police report concerning Vitale's accident noted that the brakes on the automobile were defective and that there had been a school crossing guard and a stop sign at the intersection where the accident occurred. (Record 29, 30)...." (Note 7, 447 U.S. 410, 418, 65 L. Ed. 2d 228, 237)

by Alabama law, necessarily involves recklessness, and the Alabama Courts have rejected such an argument. Evans v. State, 36 Ala. App. 145, 53 So. 2d 764 (1951)[7] In fact, the Alabama Courts have held that driving under the influence does not necessarily involve even negligence. Chattahoochee Valley Railway Co. v. Williams, 267 Ala. 464, 103 So. 2d 762 (1958)[8] Thus, if in the assault prosecution the State proved only that Eley drove under the influence and

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[7]"...It is not necessary for the prosecution to establish that the degree or extent of intoxication had reached the stage where it would interfere with the proper operation of the vehicle..." (53 So. 2d 764, 766)

[8]"...Likewise, in the instant case, the intoxication of plaintiff, if he was in fact intoxicated, would not in and of itself alone constitute such contributory negligence as to bar his recovery if plaintiff 'nevertheless exercised the care of a reasonably prudent driver' on the occasion of the accident which is the basis for this suit...." (103 So. 2d 762, 766)

collided with Mrs. Hellums' automobile, Eley would be due to be acquitted, not on grounds of former jeopardy but on grounds of the insufficiency of the evidence. Thus, the holding of the State Courts conflicts with that of the majority opinion of this Honorable Court in Vitale on four different points: (1) Dismissing the prosecution before trial; (2) Ruling that a misdemeanor which is not an element of a felony bars the felony prosecution; (3) holding that evidence of conduct represented by a misdemeanor conviction is inadmissible in a felony prosecution and (4) ruling that a felony prosecution must be dismissed if the state must prove conduct represented by a misdemeanor conviction, even though the such conduct can, at most constitute only part of the evidence of an element of the felony.

C.

CONFLICT WITH THE DISSENTING OPINION IN VITALE.

As strange as it may seem, the Alabama Trial Judge in this case managed to rule contrary to, not only the Vitale majority opinion but to the dissenting opinion as well. This is all the more remarkable, because His Honor thought that he was relying heavily on Justice Steven's dissent.

In this dissenting opinion, Justice Stevens makes two points: First,

> "...[T]he Illinois Supreme Court made a finding that failing to reduce speed to avoid a collision is a lesser-included offense of reckless homocide as a matter of state law..." (447 U.S. 410, 422, 65 L. Ed. 2d 228, 239).

And, second:

> "...even if the State intended to rely on evidence other than respondent's failure to reduce speed to establish the element of reckless driving necessary for a homicide conviction, the

> prosecutor's failure to apprise the respondent and the court of such a theory at some point in the lengthy proceedings on the double jeopardy issue should bar the second trial in this case...." (Ibid)

Applying the Vitale Dissenters' views to the instant case, the double jeopardy clause would not bar the assault prosecution. The Honorable Trial Judge expressly held that driving under the influence was not an element of assault with an automobile. No Alabama Court has ever held that driving under the influence bears any legal relationship at all to assault, and such a holding would be outlandish.[9] In addition, the State

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[9]If driving under the influence was an element of assault with an automobile, a person who ran down a citizen could escape liability by proving that he had not been drinking.

advised the Honorable Trial Court of its intention to prove reckless acts in addition to drunk driving[10] and indeed, as noted above (see pages 27-29), such proof would be essential even without the former jeopardy problem.

Therefore, even under the Vitale dissent, Eley in this case has no double jeopardy claim.

D.

CONFLICT WITH VITALE'S TREATMENT OF BLOCKBURGER V. UNITED STATES, (284 U.S. 299 [1932])

The Honorable Trial Judge ruled that it was obvious that under this Honorable

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[10]The Honorable Trial Judge found:

> "...The state represented that in addition to evidence of intoxication, at trial it expects to introduce evidence of speeding, inattentive driving, running a blinking red light and failure to yield the right-of-way, thereby avoiding the bar of the double jeopardy clause...." (R. 30, Appendix "A", p. 24)

Court's decision in Blockburger v. United States, (284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 [1932]), Eley had no former jeopardy claim in the assault prosecution. However, His Honor found that Vitale represented an effort on the part of this Honorable Court to modify, supercede or overrule Blockburger.

Did Vitale overrule, supersede or limit Blockburger? The Petitioner will not presume to tell this Honorable Court what it intended. However, nothing in the Vitale majority opinion suggests such an intention. On the contrary the Court goes to great lengths to show how the Illinois Courts may have misapplied the Blockburger rule to Illinois Law. The majority opinion cites Blockburger by name five (5) times in Vitale and relies on it throughout the opinion. The Petitioner State suggests that Vitale represents an effort to preserve and

follow Blockburger, not to limit it. The dissenting opinion likewise presents no question of Blockburger's viability.

The apparent continued viability of Blockburger is clearly demonstrated by a case decided nine (9) months after Vitale. Albernaz v. United States, 450 U.S. 333, 67 L. Ed. 2d 275, 101 S. Ct. 1137 (1981) Albernaz was a unanimous decision but not a unanimous opinion. After stating the issue in the case, the Albernaz majority stated:

> "...The answer to the petitioners' contention is found, we believe, in application of the rule announced by this Court in Blockburger v. United States, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932) and most recently applied last term in Whalen v. United States, 445 U.S. 684, 63 L. Ed. 2d 715, 100 S. Ct. 1432 (1980)[11]..." (450 U.S. 333, 337, 67 L. Ed. 2d 275, 280)

---

[11]Actually, the most recent application of Blockburger prior to Albernaz was in Vitale.

The Albernaz majority then goes on to decide the case under Blockburger, specifically mentioning that case nine (9) additional times. Three of the four Vitale dissenters concurred in Albernaz. They agreed with the majority's conclusion but disagreed with certain of Their Honor's statements; the basis of the concurrers' position was Blockburger. Albernaz v. United States, 450 U.S. 333, 335, 67 L. Ed. 2d 275, 286, 101 S. Ct. 1137 (1981)

In an even more recent case, Missouri v. Hunter (___ U.S. ____, 74 L. Ed. 2d 535, 103 S. Ct. ____, [1983]) the Court again cited and relied on Blockburger, citing the case nine (9) times. It would appear that Blockburger continues to represent the Constitutional standard for former jeopardy in the post-Vitale world, except in Alabama.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama, respectfully submits that the decisions and opinions of the Honorable Respondent Judge, the Circuit Court of Montgomery County, Alabama, Court of Criminal Appeals and the Supreme Court of Alabama in this case present conflicts with the prior decisions and opinions of this Honorable Court. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decisions and opinion of the Honorable Courts of Alabama and on such review will reverse the decisions of said Courts dismissing the indictment of Respondent Eley.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of May, 1983, I did serve the requisite number of copies of the foregoing on the Attorney for William Sanford Eley II and Honorable William R. Gordon, Circuit Judge, Respondents, by mailing same to him, first class postage

prepaid and addressed as follows:

Honorable Maury Smith
P. O. Box 78
c/o Smith, Bowman, Thagard, Crook
and Culpepper
Attorneys at Law
2 Dexter Avenue
Montgomery, Alabama 36101

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

82 - 1920

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,

Petitioner

V.

WILLIAM SANFORD ELEY, II AND HONORABLE
WILLIAM R. GORDON, CIRCUIT JUDGE,

Respondents

APPENDIX

TO THE PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA;
THE COURT OF CRIMINAL
APPEALS OF ALABAMA AND THE
CIRCUIT COURT OF MONTGOMERY
COUNTY, ALABAMA

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
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ATTORNEYS FOR PETITIONER

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ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

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APPENDIX A

CIRCUIT COURT

FIFTEENTH JUDICIAL CIRCUIT

CC-82-513-G

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
	)	OPINION AND ORDER
v.	)	
	)	
WILLIAM S. ELEY, II,	)	
	)	
Defendant	)	

The defendant is charged before this court with the offense of assault in the first degree.[1]/

On December 31, 1981, the automobile defendant was operating was involved in collision with an automobile which Karen H. Hellums was driving. Mrs. Hellums was

---

[1]/ Alabama Code §13A-6-20(a)(3) provides:

"(a) A person commits the crime of assault in the first degree if:

*****

injured in the collision. Defendant was immediately charged by Montgomery City Police with driving under the influence (intoxicating beverages) and failure to yield the right-of-way. On January 11,

---

Footnote 1 con't:

(3) Under circumstances manifesting extreme indifference to the value of human life,he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to any person;"

Alabama Code §13A-2-2(3) defines "recklessly", as follows:

"A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and justifiable risk that the result will occur or that the circumstances exist. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates a risk but is unaware thereof solely by reason of voluntary intoxication, as defined in subdivision (3)(2) of section 13A-3-2, acts recklessly with respect thereto." (Emphasis supplied)

1982, the municipal court of the City of Montgomery nolle prossed the failure to yield right-of-way charge, and, after a plea of not guilty, convicted the defendant of the DUI charge, fined him $250.00 plus court costs and sentenced him to thirty (30) days in the county jail, which jail term was suspended.[2]/

On April 2, 1982, defendant was indicted for the present offense arising out of the same incident. The indictment, in pertinent part, alleges, as follows:

---

[2]/ Montgomery City Code, 1980, §25-68 provides:

"It shall be unlawful for any person who is under the influence of intoxicating liquors or beverages, narcotics or barbiturate drugs, or who is a habitual user of narcotics or barbiturate drugs, to operate any motor vehicle on any of the public streets, highways or passageways of the city or its police jurisdiction, or upon or over any private driveway or passageway or parking area not belonging to such operator. Upon conviction therefor, such person shall be fined not less than two hundred dollars hundred dollars or imprisoned in the city jail

"William Sanford Eley, II...., did, under circumstances manifesting extreme indifference to the value of human life, recklessly engage in conduct which created a grave risk of death to another person and did thereby cause serious physical injury to Karen H. Hellums by operating a motor vehicle while the said William Sanford Eley, II was under the influence of

---

Footnote 2 con't"

for not less than ten days nor more than six months, or by both such fine and imprisonment, at the discretion of the municipal judge. As additional punishment, the municipal judge trying the case shall have the authority to prohibit the person so convicted from driving any motor vehicle upon the streets or highways of the city for a period not to exceed a year. (Ord. No. 52-72, §9-2)"

There are no lesser included offenses of driving under the influence. Ala. Code §32-5A-191(c).

This is not a case where the defendant has attempted to create double jeopardy. See: Dunaway v. State, 398 So. 2d 658 (Miss. 1981). This is also not a case where the state was unable to proceed on the more serious charge at the outset. Brown v. Ohio, 432 U.S. 161 (1977) (footnote #7). See: State v. Escabar, 633 P.2d 100 (Ct. App. Wash. 1981).

intoxicating beverages, and did cause said motor vehicle to run into, over, upon, against or collide with the motor vehicle in which the said Karen H. Hellums was driving, thereby causing serious physical injury to the said Karen H. Hellums,...."

Defendant filed a Plea of Autrefois Convict on April 29, 1982, which plea was denied by this court. Defendant then filed a Plea of Former Jeopardy grounded on Section 9 of the Constitution of Alabama, 1901, and the fifth and fourteenth amendments to the United States Constitution. This plea was heard by the court on June 28, 1982.

THE DOUBLE JEOPARDY CLAIM

The only question presented is whether defendant's conviction in the municipal court of the offense of driving

under the influence is a bar to the instant prosecution for assault in the first degree.[3]/ Traditionally, the issue would be put, under the facts of this case are the offenses of driving under the influence and assault in the first degree the same for double jeopardy purposes? An analysis of defendant's claim that the offenses are the same requires the court to explore one of the most complex and vexing areas of criminal law. The analysis undertaken by the court has been time-consuming and laborious for what appears at first blush to be an issue easily pared to its bare essentials and summarily disposed of. Such is far from the case.

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[3]/ The concept of dual sovereignty has been abolished. Waller v. Florida, 397 U.S. 387 (1970).

Defendant rests his plea on Illinois v. Vitale, 347 U.S. 410 (1980) -- with all respect, a case simply written, but with a labyrinthian result. Before examining Vitale, certain fundamental concepts of double jeopardy should be noted.

The double jeopardy clause of the United States Constitution (fifth amendment) applies to the states through the fourteenth amendment. Benton v. Maryland, 305 U.S. 784 (1939). "The constitutional prohibition of double jeopardy has been held to consist of three separate guarantees: (1) 'it protects against a prosecution for the same offense after acquittal. [(2)I]t protects against the second prosecution for the same offense after conviction. [(3)] and it protects against multiple punishments for the same offense.

(citation omitted) " Vitale at 415. This court is only concerned with the second of these guarantees.

Since 1932 the cornerstone of analysis to determine if two offenses are the same for federal double jeopardy has been the test set out in Blockburger v. United States, 284 U.S. 299, 304 (1932), as follows:

"[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." (citation omitted)

The test has been restated by various American courts. Comment, Twice In Jeopardy, 75 Yale L.J. 262 (1965).

The test is applicable to state cases. Brown v. Ohio, 432 U.S. 161 (1977). Further, the test is a rule of statutory construction to be utilized to determine if Congress intended that a single transaction would be violative of more than one statute. Albernaz v. United States, 450 U.S. 333 (1981).

Defendant concedes, as he must, that application of Blockburger to the instant case requires that the plea be overruled. However, he earnestly contends that Vitale has modified Blockburger and that application of the modified test requires the court to sustain the plea.

Additionally, prior to Vitale, there is little reason to question but that under the facts of the case sub judice, the plea fails. See: United States v. DeCoteau, 516 F.2d 16 (8th Cir. 1975), and United States v. DeMarrias, 441 F.2d 1304

(8th Cir. 1971))both cases holding that a prior conviction for driving while intoxicated did not bar on double jeopardy grounds a subsequent prosecution for involuntary manslaughter). See also: United States v. Kills Plenty, 466 F. 2d 240 (8th Cir. 1972) (there is no double jeopardy bar to a subsequent prosecution for involuntary manslaughter after an acquittal of driving while intoxicated). But ct.: Humphries v. Wainwright, 584 F.2d 702 (5th Cir. 1978) (a prior acquittal of driving while intoxicated collaterally estopps [Ashe v. Swenson, 397 U.S. 436 (1970)] a subsequent prosecution for vehicular manslaughter by intoxication), and Bacom v. Sullivan, 200 F. 2d 70 (5th Cir. 1952), cert. denied, 73 S.Ct. 651 (1953). See: Annot., 25 L.Ed2d 968 (1970). An excellant pre-Vitale discussion of why a prior

conviction of driving intoxicated is not a bar to a charge of manslaughter resulting from operating an automobile while intoxicated is contained in State v. Stiefel, 256 So.2d 581 (Fla. Dist. Ct. App. 19720.

THE TRADITIONAL ALABAMA TEST

In Echols v. State, 35 Ala. App. 602 (Crim. App. 1951), Echols was convicted, of leaving the scene of an accident on appeal he contended, inter alia, that the lower court erred in not sustaining a plea of autrefois convict because he had previously been convicted of manslaughter growing out of the same incident. The court, relying on Brown v. State, 200 So. 630 (Ala.1941), set out the test, as follows:

> "[W]hether the facts averred in the second indictment, if found to be true, would have warranted a conviction upon the *first indictment. In other* words, in determining whether both indictments charge the same offense, the test

> generally applied is that when the facts necessary to convict on the second prosecution would necessarily have convicted on the first, a final judgment on the first prosecution would be a bar to the first...."

The court concluded that the plea was properly overruled because the second offense (manslaughter) was completed before the second (leaving the scene of an accident) occurred. The Echols test comports with Blockburger in that proof of leaving the scene requires proof of an additional fact, i.e., an accident and defendant leaving the scene.

The state cites Green v. State, 389 So. 2d 537 (Crim. App.), cert. denied, 389 So. 2d 541 (Ala. 1980), as authority that the defendant's plea should be denied. In Green a search of Green's residence resulted in the seizure of numerous controlled substances. The defendant was tried in municipal court

for misdemeanor possession of marijuana (one of the controlled substances seized) and her case taken under advisement. Upon indictment in seven counts for possession of seven different controlled substances (there was no count for possession of marijuana), defendant filed a plea of former jeopardy which the trial court overruled, and this was assigned as error on appeal. At page 538 the Court of Appeals utilized the Blockburger test as expressed in Hattaway v. United States, 399 F.2d 431 (5th Cir. 1968), in holding the offenses were not the same because of the "distinct elements of one prosecution that are not present in the other," i.e., proof of each different controlled substance. Green could have probably been more easily disposed of by relying on Little v. State, 339 So. 2d 1071 (Crim. App. 1976). Little was

indicted for the offense of involuntary manslaughter by automobile and also charged with reckless driving growing out of the same accident. After conviction in municipal court of the offense of reckless driving, Little filed a plea contending that the prosecution of manslaughter should be barred on double jeopardy grounds. However, Little had appealed the reckless driving conviction to circuit court for trial de novo. Thus, the court of appeals found that Little had not been placed in jeopardy because there was no conviction. It is most interesting to note, albeit dicta, that the court said that although reckless driving may be a component (element?) of second degree manslaughter, it is not the same offense.

In Green the defendant was found guilty as charged (seven count indictment

for possession of controlled substances) and sentenced to a term of imprisonment of three (3) years. Green is difficult to reconcile with the unreported case of Vogel v. State, ____ So. 2d ____ (Crim. App. October 28, 1980) aff'd, Ex parte Vogel, ____ So. 2d ____ (Ala. July 23, 1982) rehearing pending. The Vogel brothers were indicted for fourteen counts of violating the Alabama Uniform Controlled Substances Act by being in position of a number of different controlled substances on the same occasion. Upon being adjudged guilty, they were sentenced on each count of the indictment. Defendants contended on appeal that the multiple sentences ran afoul of the double jeopardy clause since under the facts of the case only one offense was committed whereas multiple punishments were imposed. The Court of

Appeals agreed and said, as follows:

> "It is thus our holding that where, as here, there is but a single point of control in time and place over several types of controlled substances, only a single offense has been committed, the offense of possession of controlled substances, and only one sentence is authorized?"

Other than the fact that in Green the controlled substances were seized from a residence and in Vogel they were seized from a vehicle, the cases are factually on all fours, except the manner in which the jeopardy claim arose. Neither the Vogels nor Green was indicted for possession of marijuana. Marijuana is a controlled substance just as were the other substances for the possession of which the persons were indicted. The court in Green at 538 refers to a difference in proof required to prove a simple possession of marijuana as

opposed to that required to prove possession of some other controlled substance, however, the proof required is the same. The state must prove that the substance was possessed by the defendant and that it was a controlled substance. See: Cook v. State, 341 So. 2d 183 (Crim. App. 1977) and DeGruy v. State, 323 So.2d 406 (Crim. App. 1975). In any event, to reach the result in Green, the court held that there were multiple offenses and not one. In view of the holding in Vogel, Green is questionable and not good authority for the state's position in the case sub judice.

The lesson in Vogel as it relates to the issue before this court is that there was only one act of possession, and, therefore, only one offense for which the Vogels could be punished. In the instant case the argument that there were two

separate acts has substance. The basis of the argument is that driving under the influence was an act completed prior to the collision, and, therefore, the assault. Echols v. State, supra. However, it must be considered in light of Vitale.

In other double jeopardy decisions the Alabama Supreme Court has couched the test in terms of offenses being the same for double jeopardy purposes only if they are the same in law and fact (the identity test). Racine v. State, 291 Ala. 684 (Ala. 1973). See those cases collected in Vol. 5B, Ala. Digest, Criminal Law, Key No. 195(1). It is obvious that under the test in Racine, supra, the plea in the instant case should be denied.

THE ALABAMA CRIMINAL CODE

The Alabama Criminal Code (Alabama Code §§13a-1-1, et seq.) recognizes that the same conduct of the defendant may establish the commission of more than one offense, but also provides that under certain circumstances the defendant may not be convicted in successive prosecutions for the same conduct. §13A-1-8(b). One of the circumstances is where the offenses are included within the other.

The elements of assault in the first degree are: (1) that the victim suffered a serious physical injury, (2) that the serious physical injury was caused by the defendant, and (3) that in causing such injury the defendant acting under circumstances manifesting extreme indifference to the value of human life, recklessly engaged in conduct which

created a grave risk of death to any person. Alabama Pattern Jury Instructions, Criminal, Page III-C-22. The elements of driving under the influence of intoxicating beverages are: (1) defendant was operating a motor vehicle, and (2) was under the influence of intoxicating beverages. Montgomery City Code 1980, §25-68. Examining the statutory elements of the offense only leads the court to the conclusion that driving under the influence is not a lesser included offense of assault in the first degree and since no other subsections of §13A-1-8(b) would prohibit the instant prosecution, the statute would not be a bar. However, the court must consider, infra, whether under the indictment, as framed, driving under the influence is a species of a lesser included offense.

ILLINOIS V. VITALE, 347 U.S. 410 (1980)

Vitale (a juvenile) operated a vehicle which struck and killed two small children. He was immediately charged and convicted of the traffic offense of failing to reduce speed to avoid an accident in violation of the Illinois Vehicle Code (a petty offense under Illinois law). The day following his conviction of the traffic offense, Vitale was charged in the juvenile court with two counts of involuntary manslaughter (a felony under Illinois law). The petition alleged that Vitale "without lawful justification while recklessly driving a motor vehicle caused the death of the two children...." Vitale at 412. Vitale filed a motion to dismiss the petition grounded on statutory and/or constitutional double jeopardy grounds. The juvenile court dismissed the petition

as being barred by Illinois statutes that required that all offenses based on the same conduct be prosecuted in a single prosecution (compulsory joinder statute). This ruling was affirmed by the Illinois Appellate Court. The Illinois Supreme Court affirmed, basing its decision squarely on the double jeopardy clause of the fifth amendment. The United States Supreme Court remanded to the Illinois Supreme Court for that Court to determine (which it had already done, but not to the United State Supreme Court's satisfaction) whether under Illinois law careless failure to slow is always a necessary element of manslaughter. Vitale at 419. The court specifically remanded the case with the following language:

> "Because of our doubts about the relationship under Illinois

> law between the crimes of manslaughter and a careless failure to reduce speed to avoid an accident, and because the reckless act or acts the state will rely on to prove manslaughter are still unknown, we vacate the judgment of the Illinois Supreme Court and remand the case to that court for further proceedings not inconsistent with this opinion." 347 U.S. at 421 (emphasis supplied)

The emphasized language together with other language in the opinion, gives rise to some uncertainty concerning the holding[4]/ and its proper application to the instant case.

At oral argument on defendant's plea, all counsel agreed that if the only

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[4]/The uncertainty is probably exemplified by the fact that, according to information developed by the court and current some thirty days ago, the Illinois Supreme Court considered Vitale for approximately six months and remanded the case to the juvenile division of the Circuit Court of Cook County, Illinois, for proceedings not inconsistent with the opinion of the United States Supreme Court. The case remains in the breast of the juvenile court.

reckless act to be relied upon by the state to sustain its prosecution is driving under the influence of intoxicating beverages, Vitale would compel that the plea be sustained. Counsel further agree that driving under the influence is not always a statutory element of assault in the first degree. The state represented that in addition to evidence of intoxication, at trial it expects to introduce evidence of speeding, inattentive driving, running a blinking red light and failure to yield the right-of-way, thereby avoiding the bar of the double jeopardy clause.

As a further aid to the court, counsel were subsequently required to file written briefs on the issue of whether the state is required to prove that defendant was driving under the

influence of intoxicating beverages or suffer an acquittal. Defendant argued that the state must and the state conceded the point.

Against the factual posture of the case, Vitale must be examined.

Much of the language of Vitale comports with the Blockburger test and its recent progeny, vix., Brown v. Ohio, 432 U.S. 161 (1977) and Harris v. Oklahoma, 433 U.S 682 (1977). The court spoke in terms of whether failure to slow was always a necessary element of manslaughter which language is compatible with its prior holdings that the court must examine the abstract proof necessary to sustain the statutory elements of the offense and not the actual evidence to be adduced at trial. Vitale at 419. However, in the same breath, the court then used certain language which appears

to indicate quite the opposite at page 419, as follows:

> "If, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the" 'same' "under Blockburger, and Vitale's trial on the latter charge would constitute double jeopardy under Brown v. Ohio. In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under Brown and our later decision in Harris v. Oklahoma." (citation omitted) (emphasis supplied).

Although the majority stopped short of concluding that under these circumstances the prosecution would be barred, Justice Stevens was not so restrained in his dissent (joined by

Justice Brennan, Steward and Marshall) when he concluded at page 426, as follows:

> "In part IV of its opinion the court states that, even if the Illinois Supreme Court should hold on remand that failure to reduce speed is not always a lesser-included offense as a matter of state law, respondent will still have a single "substantial" double jeopardy claim if the state finds it necessary to rely on his failure to reduce speed in order to sustain its manslaughter case. In my opinion such a claim would not merely be 'substantial'; it would be dispositive." (emphasis supplied)

It is the quoted language of the majority when considered with Justice Steven's dissent which the defendant says signals the court's retreat from the abstract proof test of Blockburger; and requires the court to sustain the plea.

The Supreme Court's decisions in Brown and Harris each considered offenses

which embraced lesser included offenses, or a species of lesser included offense. In the instant case the court would not ordinarily conclude that driving under the influence of intoxicating beverages is a lesser included offense of assault because it includes elements not embraced in assault, although it may be a component of the actual proof. In order for an offense to be a lesser included offense for purposes of charging on lesser included offenses, each element of the lesser offense must be included in the higher offense. Mayes v. State, 350 So. 2d 339 (Crim. App. 1977). To be necessarily included in the greater offense, the lesser must be such that it is impossible to commit the greater without having first having committed the lesser. Sharpe v. State, 340 So. 2d 885

(Crim. App.), cert. denied 340 So. 2d 889 (Ala. 1976). The comments of §13A-8-1(b) note that this subsection follows prior Alabama law.

In Vitale, the court noted that the Brown decision rested on a finding that for a conviction of a lesser included offense to preclude later prosecution for the greater offense, it was essential that the elements of the lesser included offense prove the greater offense, and, also, that proof of the greater offense likewise prove the lesser included offense. In Harris, the court likewise found that where the conviction of the greater offense could not be had without proof of the lesser included offense, prosecution for the greater offense is barred. The Harris court referred to the underlying felony as a "species" of lesser included offense in reaching its

conclusion, and Harris appears to be more analogous to the case at bar. When the court in Vitale concludes that "in any event" it may be that failure to slow is not always a necessary element of the offense of manslaughter, it is then saying that failure to slow may be a species of lesser included offense, and if it must be proved to succeed to verdict on the greater offense -- the prosecution for the greater offense is barred. This language also permits the court to examine the actual evidence to be adduced at trial rather than the abstract proof necessary to prove the statutory elements of assault.

In the instant case the state has conceded that because the element of recklessness has been described in the indictment as driving under the influence of intoxicating beverages, it must prove

defendant was driving under the influence or suffer an acquittal. The reasoning of Harris and Vitale addresses itself to such a situation inasmuch as under the indictment as framed the state must prove conduct for which defendant has already been convicted to prove the greater offense, and, thus, the state has made driving under the influence a species of lesser included offense and prosecution for the greater offense is barred.

Defendant invites this court to go further and find that the state is precluded from offering any evidence whatsoever that defendant was intoxicated. The court must decline that invitation since under this holding it need not reach that issue.

It is, therefore, ORDERED that defendant's plea of former jeopardy is

well taken and that the indictment, as framed, is DISMISSED.

DONE and ORDERED in chambers this 1st day of September, 1982.

/s/
WILLIAM R. GORDON
Circuit Judge

District Attorney
Edward Parker

ORDER OF COURT DISMISSING INDICTMENT

WEDNESDAY, SEPTEMBER 1, 1982

COURT MET PURSUANT TO ADJOURNMENT

PRESENT THE HONORABLE WILLIAM R. GORDON, JUDGE PRESIDING

STATE OF ALABAMA

VS. CC-82-513-G OFFENSE - ASSAULT I

WILLIAM SANFORD ELEY, II

This day came the State by its District Attorney and came also the defendant in his own proper person and by his attorney, Honorable Maury Smith, and it appearing to the court that the defendant heretofore filed a plea of former jeopardy, and upon consideration of same, it is ordered by the court that defendant's plea of former jeopardy is well taken and that the indictment, as framed, is dismissed.

APPENDIX B

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

3 DIV. 740

Ex parte State of Alabama

In re: State of Alabama v. William Sanford Eley, II

PETITION FOR WRIT OF MANDAMUS

Montgomery Circuit Court

IT IS ORDERED that the petition for writ of mandamus be and the same is hereby denied. All the Judges concur.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 10th day of January, 1983.

/s/
CLERK, COURT OF CRIMINAL APPEALS OF ALABAMA

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

3 DIV. 740

Ex parte State of Alabama

In re: State of Alabama v. William Sanford Eley, II

PETITION FOR WRIT OF MANDAMUS

Montgomery Circuit Court

IT IS ORDERED that the request for finding of additional facts by and the same is hereby denied.

IT IS FURTHER ORDERED that the application for rehearing be and the same is hereby overruled.

All the Judges concur.

WITNESS, Mollie Jordan, Clerk OF the Court of Criminal Appeals, this 24th day of January, 1983.

/s/
CLERK, COURT OF CRIMINAL APPEALS OF ALABAMA

APPENDIX C

MAILING ADDRESS:

P. O. Box 157
Montgomery, Alabama 36101

TELEPHONE:
832-6480

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

April 8, 1983

Re: 82-414

Ex Parte: State of Alabama
PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
(Re: Ex Parte: State of Alabama
Petition for Writ of Mandamus)

Appellant

vs.

Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____Appell____ granted 7 additional days to file briefs to and including

_____Appellant(s) granted 7 additional days to file reply briefs to and including

_____Record on Appeal filed

_____Appendix Filed

_____Submitted on Briefs

XXXXXPetition for Writ of Certiorari denied. No opinion.

SHORES, J. -- ALL THE JUSTICES CONCUR.

_____Application for rehearing overruled. No opinion written on rehearing.

_____Permission to file amicus briefs granted.

_____

/s/
Dorothy F. Norwood

Acting Clerk, Supreme Court of Alabama

APPENDIX D

CODE OF ALABAMA, 1975
TITLE 13A

§13A-6-20. Assault in the first degree.

(a) A person commits the crime of assault in the first degree if:

(1) With intent to cause serious physical injury to another person, he causes serious physical injury to any person by means of a deadly weapon or a dangerous instrument; or

(2) With intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such an injury to any person; or

(3) Under circumstances manifesting extreme indifference to the value of human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to any person; or

(4) In the course of and in furtherance of the commission or attempted commission of arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life, or of immediate flight therefrom, he causes a serious physical injury to another person.

(b) Assault in the first degree is a Class B felony. (Acts 1977, No. 607, p. 812, §2101.)

APPENDIX E

MONTGOMERY CITY CODE

Sec. 25-68. Driving under the influence of drugs, etc.

It shall be unlawful for any person who is under the influence of intoxicating liquors or beverages, narcotics or barbiturate drugs, or who is a habitual user of narcotics or barbiturate drugs, to operate any motor vehicle on any of the public streets, highways or passageways of the city or its police jurisdiction, or upon or over any private driveway or passageway or parking area not belonging to such operator. Upon conviction therefor, such person shall be fined not less than two hundred dollars or imprisoned in the city jail for not less than ten days nor more than six months, or by both such fine and imprisonment, at the discretion of the municipal judge. As additional punishment, the municipal judge trying the case shall have the authority to prohibit the person so convicted from driving any motor vehicle upon the streets or highways of a city for a period not to exceed one year. (Ord. No. 54-72, §9-2.)

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of May, 1983, I did serve the requisite number of copies of the foregoing on the Attorney for William Sanford Eley, II and Honorable William R. Gordon, Circuit Judge, Respondents, by mailing same to him, first class postage

prepaid and addressed as follows:

Honorable Maury Smith
P. O. Box 78
c/o Smith, Bowman, Thagard, Crook
and Culpepper
Attorneys at Law
2 Dexter Avenue
Montgomery, Alabama 36101

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

NO. 82-1920

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

STATE OF ALABAMA

Petitioner,

—vs—

WILLIAM R. GORDON, JUDGE, CIRCUIT COURT
OF MONTGOMERY COUNTY
(WILLIAM SANFORD ELEY, II,
REAL PARTY IN INTEREST),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT, THE ALABAMA COURT OF CRIMINAL APPEALS AND THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MAURY SMITH
COUNSEL OF RECORD FOR
THE RESPONDENTS
SMITH, BOWMAN, THAGARD,
CROOK & CULPEPPER, P.A.
Post Office Box 78
Montgomery, AL 36101
(205) 834-6500

EDWARD B. PARKER, II
ATTORNEY FOR THE
RESPONDENTS
SMITH, BOWMAN,
THAGARD, CROOK &
CULPEPPER, P.A.
Post Office Box 78
Montgomery, AL 36101
(205) 834-6500

QUESTION PRESENTED

Whether the State's Petition for Certiorari is due to be denied.

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I. STATEMENT OF THE CASE

On April 2, 1982, the Montgomery County Grand Jury returned a "True Bill" indicting the Respondent, William Sanford Eley, II, of assault in the first degree. He filed a "Plea of Not Guilty and Waiver of Arraignment" on April 21, 1982. Eight days later, Eley filed a "Plea of Autrefois Convict", which was denied by the Respondent, Judge William R. Gordon, after oral argument, on June 15, 1982.

On June 24, 1982, Eley filed a "Plea of Former Jeopardy", which was later briefed and argued orally both by his counsel and by counsel for the Petitioner, the State of Alabama. Judge Gordon granted the same on September 1, 1982 thereby dismissing the indictment, *as framed*. (Petitioner's Appendix 1-33). The State filed its Notice of Appeal on September 7, 1982, under Senate Bill 60's purported grant to the State of the right to appeal from such a *pretrial* order dismissing an indictment on double jeopardy grounds.

On October 20, 1982, after both Eley and the State had submitted briefs and made oral argument, the Alabama Court of Criminal Appeals granted Eley's Motion to Dismiss the State's appeal inasmuch as Senate Bill 60 was found to have been "pocket vetoed" by then Governor Fob James. The Alabama Supreme Court subsequently denied certiorari on December 17, 1982. *State v. Eley*, 423 So.2d 303 (Ala. Cr. App.), *cert. denied*, 423 So.2d 305 (Ala. 1982).

The State, on January 5, 1983, filed a Petition for a Writ of Mandamus in the Alabama Court of Criminal Appeals thereby seeking, by *subterfuge*, to obtain review, on the merits, of Judge Gordon's pretrial order dismissing its indictment on double jeopardy grounds. Five days later, the Alabama Court of Criminal Appeals denied the State's Petition for a Writ of Mandamus. (Petitioner's Appendix 34). The State's Application for Rehearing

and Request for the Finding of Additional Facts, both filed January 20, 1983, were also denied by that Court four days later. (Petitioner's Appendix 35). From this denial, the State filed a Petition for a Writ of Certiorari to the Alabama Supreme Court on February 7, 1983, which was also denied on April 8, 1983. (Petitioner's Appendix 36-37). Finally, on or about May 25, 1983, the State filed its instant Petition for a Writ of Certiorari in this Court.

II. STATEMENT OF THE FACTS

The Respondents incorporate by reference the last paragraph of their Statement of the Case set forth immediately above as if the same were set forth fully herein.

III. SUMMARY OF THE ARGUMENT

The Petitioner admittedly now seeks review on certiorari from the State courts' denial of its Petition for Mandamus. This decision was based solely on State law without any consideration whatsoever given to the double jeopardy issue the Petitioner erroneously contends is now before this Court. Since no federal question was ever involved, much less one of a substantial nature, then certiorari review is not proper.

In any event, since the State has no right of appeal from Judge Gordon's decision and the double jeopardy issue could not have been considered and was not considered through a mandamus subterfuge by any other Alabama court, then Judge Gordon's pretrial order dismissing the indictment on double jeopardy grounds was the decision from the highest court in which a decision could be had on this issue. Such decision, by its very nature, was interlocutory in character and did not constitute a final judgment necessary for review by certiorari.

Finally, since Judge Gordon's decision is from the highest state court in which a decision could be had on the double jeopardy

issue, then the State's time within which to seek review by certiorari began to run from the date of said pretrial order and the filing herein was thus not done in a timely manner.

IV. THE STATE'S PETITION FOR CERTIORARI IS DUE TO BE DENIED

A. The Petitioner Is Seeking Review Of A Decision Based Solely On State Law

The State admits at pages twelve and thirteen of its Petition, as the following statement quoted from the bottom of page one of its June 3, 1983 letter to the Clerk of this Court further indicates, that "This action seeks review of the State courts' disposition of a *mandamus* proceeding in which Judge Gordon was the Respondent Judge." (emphasis added).

The State's Petition for Mandamus was evaluated *only* under established Alabama precedent regarding the granting of such writs, and it was found to be lacking merit since Judge Gordon's pretrial order dismissing the indictment on double jeopardy grounds was an affirmative action not outside the scope of his power, *Ex parte Nice*, 407 So.2d 874, 878, 882 (Ala. 1981), and not an abuse of his discretion. *State v. Cannon*, 369 So.2d 32, 33 (Ala. 1979). The double jeopardy issue was not even considered since mandamus is not "a substitute for appeal" under Alabama law. *Id.*

Just as it did below in its attempt to use mandamus as a subterfuge to remedy its lack of a right to appeal, the State, in its zeal to pursue the prosecution of Eley, has once again committed a most serious and costly procedural error. By admittedly now seeking review of *only* the mandamus denial, the State is petitioning this Court to review a decision based *solely* on State law, which did not even involve a federal question, much less one of a substantial nature as required by Rule 17(1)(c) of this Court's Rules. Such review is also not permitted under the jurisdictional basis,

28 U.S.C. §1257(3), cited by the State at page three of its Petition. *See New York Times v. Jascalevich*, 439 U.S. 1317, 1318, 58 L.Ed.2d 25, 28, 99 S.Ct. 6, ——— (1978); *Duncan v. Tennessee*, 405 U.S. 127, 127, 31 L.Ed.2d 86, 87, 92 S.Ct. 785, ——— (1972); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 73-74, 99 L.Ed. 897, 901, 75 S.Ct. 614, ——— (1954); *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-18, 94 L.Ed. 562, 565-66, 70 S.Ct. 252, ——— (1950); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47, 80 L.Ed. 688, 710-11, 56 S.Ct. 466, ——— (1936).

B. The Petitioner Is Not Seeking Review Of A Final Judgment

The jurisdictional basis, 28 U.S.C. §1257(3,) cited by the State at page three of its Petition not only mandates that the decision sought to be reviewed by certiorari herein must have been rendered by *the highest court in which a decision could be had* but it also requires that such decision be *a final judgment or decree.*

Inasmuch as both the Alabama Court of Criminal Appeals and the Alabama Supreme Court concluded that then Governor Fob James had "pocket vetoed" Senate Bill 60 thereby leaving the State without a right of appeal from Judge Gordon's decision, *supra* at 1, and inasmuch as both the Alabama Court of Criminal Appeals and the Alabama Supreme Court could not and did not consider the double jeopardy issue during their respective analyses of the State's mandamus subterfuge, *supra* at 3-4, then the *highest court* from which a *judgment* on the *double jeopardy issue* could be had was that of the *trial court*, i.e., Judge Gordon. *See* C. WRIGHT, FEDERAL COURTS, § 107 at 537 (3rd ed. 1976).

However, Judge Gordon's decision (Petitioner's Appendix 1-33) was a *pretrial* order dismissing the indictment, *as framed*, on double jeopardy grounds. It was *without prejudice* to the State's right to *reindict* Eley under a new and properly framed

indictment and to thereby *continue its prosecution* of him on the assault charge. This pretrial order was therefore merely *interlocutory* in character, *See Ala. Code* (1975) §15-8-131, and by no means constituted a final judgment or decree necessary for review by certiorari. *See New York Times v. Jascalevich*, 439 U.S. 1317, 1318, 58 L.Ed.2d 25, 28, 99 S.Ct. 6, _____ (1978); *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-18, 94 L.Ed. 562, 565-66, 70 S. Ct. 252, _____ (1950).

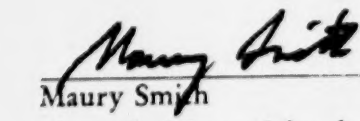
C. The Petitioner Is Not Seeking Review In A Timely Manner

Inasmuch as Judge Gordon's pretrial order dismissing the indictment was rendered by the highest court in which a decision could be had on the double jeopardy issue thus making it the State court of last resort on this question in this criminal proceeding, *supra* at 4-5, and inasmuch as said pretrial order was issued September 1, 1982 and inasmuch as the State filed its instant Petition for a Writ of Certiorari on or about May 25, 1983, then the State failed to file its Petition in a timely manner. *See* 28 U.S.C. §2101(d) and Rule 20(1) of this Court's Rules. In order to have filed in a timely manner, the State would have had to have done so within sixty days after September 1, 1982. Instead, the State filed its Instant Petition nearly nine months later. Review by certiorari has therefore been sought too late. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-18, 94 L.Ed. 562, 565-66, 70 S.Ct. 252, _____ (1950).

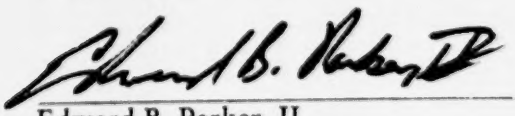
V. CONCLUSION

For the reasons stated hereinabove, the State's Petition for Certiorari is due to be denied.

Respectfully submitted,



Maury Smith
Counsel of Record for the
Respondents



Edward B. Parker, II
Attorney for the Respondents

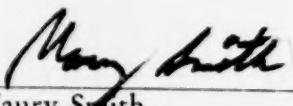
OF COUNSEL:

SMITH, BOWMAN, THAGARD,
CROOK & CULPEPPER, P.A.
Post Office Box 78
Montgomery, AL 36101
(205) 834-6500

CERTIFICATE OF SERVICE

I, Maury Smith, as a member of the Bar of the United States Supreme Court and as the Counsel of Record for the Respondents herein, do hereby certify that on this the 24th day of June, 1983, I served three (3) printed copies of the foregoing on the Petitioner's Counsel of Record, Charles A. Graddick, Esq., and Joseph G. L. Marston, III, Esq., by mailing same to them, first class postage prepaid and addressed as follows:

Charles A. Graddick, Esq.
Joseph G. L. Marston, III, Esq.
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, AL 36130



Maury Smith
Counsel of Record for the
Respondents